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Attorneys for Complainant

BEFORE THE DEPARTMENT OF BUSINESS OVERSIGHT
OF THE STATE OF CALIFORNIA

In the Matter of:)	FIL ORG ID: 995-4667
)	
THE COMMISSIONER OF BUSINESS)	CONSENT ORDER
OVERSIGHT,)	
)	
Complainant,)	
)	
v.)	
)	
JEFFERY TODD MARTIN and)	
SMALLCAKES FRANCHISE SYSTEMS,)	
LLC;)	
)	
<u>Respondents.</u>)	

This Consent Order is entered into between the Complainant, the Commissioner of Business Oversight (Commissioner) and Respondents, Jeffery Todd Martin and Smallcakes Franchise Systems, LLC (Respondents) (collectively, the Parties), and is made with respect to the following facts:

I.
Recitals

A. The Commissioner is responsible for administering and enforcing the California Franchise Investment Law (FIL), and for registering the offer and sale of franchises in California, pursuant to Corporations Code section 31000 et seq.

1 B. The Commissioner brings this action pursuant to the provisions of the FIL, and the
2 rules and regulations promulgated thereunder.

3 C. Respondents admit to the jurisdiction of the Commissioner in this matter and for the
4 purposes of issuing and enforcing this Consent Order.

5 D. At all relevant times, Jeffery Todd Martin (Martin), a resident of Kansas and Florida,
6 was the Founder and Chief Executive Officer of a cupcake franchising company called Smallcakes
7 Franchise Systems, LLC (Smallcakes).

8 E. Smallcakes was formed in Kansas in March 2011, with a former business address of
9 14383 Metcalf Avenue, Overland Park, Kansas 66223.

10 F. According to a certificate of cancellation filed with the Kansas Secretary of State,
11 Martin dissolved Smallcakes on November 15, 2011. Smallcakes' successor in interest is Westwind
12 Investments, Ltd.

13 G. On or about April 6, 2012, Martin applied to the Department of Business Oversight
14 (DBO) for a registration to offer Smallcakes' franchises in California pursuant to Corporations Code
15 section 31111. Martin signed and certified the application on behalf of Smallcakes.

16 H. To register a franchise in California, a franchisor must file a Uniform Franchise
17 Disclosure Document (FDD) with the DBO for review and approval.

18 I. The disclosures made in the FDD are intended to avoid misrepresentations and to
19 provide prospective franchisees with facts upon which to make an informed decision to purchase a
20 franchise, as stated in Corporations Code section 31001.

21 J. In the FDD, applicants are required to identify and provide information about the
22 franchisor, including whether and where the franchisor is actively registered to do business. An
23 active business registration with current business address allows prospective franchisees to take legal
24 recourse against the franchisor should any issues arise with the franchise.

25 K. Martin submitted a FDD to the DBO in April 2012 that failed to disclose that
26 Smallcakes had been dissolved in November 2011.

27 L. Martin has represented the dissolution was in error and that he was not aware that the
28 entity had been dissolved.

1 M. In addition, under Item 4. Bankruptcy in the FDD, applicants are also required to
2 comply with the following instruction:

3 “Disclose whether the franchisor; any parent; predecessor; affiliate; officer or general partner
4 of the franchisor, or any other individual who will have management responsibility relating
5 to the sale or operation of franchises offered by this document, has, during the 10-year period
immediately before the date of this disclosure document:

6 (i) Filed as a debtor (or had filed against it) a petition under the United States
7 Bankruptcy Code (“Bankruptcy Code”).

8 ***

9 N. Martin and his spouse filed for Chapter 13 bankruptcy in the District of Kansas on or
10 about January 14, 2010 (Kansas bankruptcy). The bankruptcy court discharged Martin’s and his
11 spouse’s debts on May 4, 2015.

12 O. Martin and his spouse also disclosed in the Chapter 13 bankruptcy petition that
13 Martin had previously filed for bankruptcy in Georgia on July 31, 2002 (Georgia bankruptcy).

14 P. The Kansas bankruptcy proceeding was still pending at the time Martin applied to
15 register Smallcakes as a franchisor with the DBO. Despite the pending Kansas bankruptcy
16 proceeding and the Georgia bankruptcy, Martin responded to the disclosure instruction in Item 4.
17 Bankruptcy: “No bankruptcy information is required to be disclosed in this Item.”

18 Q. Martin signed the following notarized certification on behalf of Smallcakes on March
19 30, 2012:

20 I certify and swear under penalty of law that I have read and know the contents of this
21 application, including the Franchise Disclosure Document with an issuance date of 3/15/2012
22 attached as an exhibit, and that all material facts stated in all those documents are accurate
23 and those documents do not contain any material omissions. I further certify that I am duly
authorized to make this certification on behalf of the Franchisor and that I do so upon my
personal knowledge.

24 R. Based in part on Martin’s and Smallcakes’ representations made in the FDD, the
25 DBO approved the registration of the offer and sale of Smallcakes’ franchises and issued an order
26 designating registration for the period April 9, 2012 to April 20, 2013.

27 S. Martin and Smallcakes made an untrue statement to the DBO by stating that “no
28 bankruptcy information is required to be disclosed” in response to disclosure instruction Item 4 in

1 the application, in violation of Corporations Code section 31200.

2 T. In addition, Martin and Smallcakes also omitted a material fact which was required to
3 be stated in the application filed with the DBO by failing to disclose that Smallcakes had been
4 dissolved at the time of the application, in violation of Corporations Code section 31200.

5 It is the intention and desire of the Parties to resolve these matters without the necessity of a
6 hearing and/or other litigation.

7 The Commissioner finds that this Consent Order is appropriate, in the public interest, and
8 consistent with the purposes fairly intended by the policy and provisions of the FIL.

9 **II.**
10 **Terms and Conditions**

11 1. Purpose. This Consent Order resolves the violations described above and before the
12 Commissioner in a manner that avoids the expense of a hearing and possible further court
13 proceedings, is in the public interest, protects consumers, and is consistent with the purposes,
14 policies, and provisions of the FIL.

15 2. Finality of the Consent Order. Respondents expressly waive any requirement for the
16 filing of an agency pleading that may be afforded by Government Code section 11415.60,
17 subdivision (b); the Administrative Procedure Act; the Code of Civil Procedure; or any other
18 provision of law. By waiving such rights, Respondents effectively consent to and agree to comply
19 with this Consent Order and stipulate that the Consent Order is final.

20 3. Desist and Refrain Order. Pursuant to Corporations Code section 31406, Smallcakes
21 Franchise Systems LLC and Jeffery Todd Martin consent to the issuance of a desist and refrain order
22 for violations of Corporations Code section 31200, as identified in paragraphs R and S, above.
23 Additionally, Smallcakes Franchise Systems LLC and Jeffery Todd Martin agree to desist and
24 refrain from making any untrue statement of a material fact in any application, notice or report filed
25 with the Commissioner under the FIL, or omitting to state in any such application, notice, or report
26 any material fact, which is required to be stated therein, in violation of Corporations Code section
27 31200.

28 4. Administrative Penalties. Jeffery Todd Martin agrees to pay an administrative
penalty of \$5,000.00 for violations of Corporations Code section 31200 within 30 business days

from the Effective Date of this Consent Order, as defined in paragraph 15. The penalty payment shall be made payable in the form of a cashier’s check or Automated Clearing House deposit to the “Department of Business Oversight,” and transmitted to the attention of:

ATTN: Accounting – Litigation
Department of Business Oversight
1515 K Street, Suite 200
Sacramento, California, 95814

Notice of payment shall be sent to:

Kenny V. Nguyen
Senior Counsel, Enforcement Division
Department of Business Oversight
1515 K Street, Suite 200
Sacramento, California 95814
E-mail: Kenny.Nguyen@dbo.ca.gov

In the event the payment due date falls on a weekend or holiday, the payment shall be due the next business day.

5. Ancillary Relief - Order for Remedial Education. Pursuant to Corporations Code section 31408, Jeffery Todd Martin is hereby directed to attend and complete remedial education at least thirty (30) days prior to the date he submits any new application for registration of a franchise in this state. The remedial education shall be conducted by an experienced franchise attorney, shall be held in-person for at least eight hours, and shall cover the area of California Franchise Investment Law compliance, including but not limited to the offering and selling of franchises (Training). Martin must obtain prior approval of the providers of the Training from the Commissioner. Proof of Martin’s attendance at the Training for eight hours shall be by affidavit by the trainer(s) and Martin, and shall be received by the DBO with any new application for registration of any franchise in this state. Failure to provide proof of completion of Training shall result in summary issuance of a stop order for any new registration of franchise pursuant to Corporations Code section 31408.

6. Ancillary Relief – Order to Rescind or Nullify License Agreement Terms Suggesting Marketing Plan. Jeffery Todd Martin acknowledges that he has entered into licensing agreements with residents in California whereby he has granted them a non-exclusive right to use the registered name of “Smallcakes” and “Smallcakes Cupcakery” and proprietary recipes in exchange for

1 payment of a license fee and royalties. In addition, Jeffery Todd Martin acknowledges the
2 Department's contention that certain terms of the license agreements require the licensees to adopt a
3 marketing plan substantially prescribed by Martin that is typical of a franchise agreement. These
4 terms, collectively identified as "Marketing Plan Terms" include requiring the licensee to: (1) use
5 "Logo Smallcakes Boxes" supplied by approved supplier; (2) use Smallcakes store colors of
6 "Strawberry Fields and Plantation Brown"; (3) get approval of store location and layout from
7 Smallcakes; (4) only sell or offer for sale such products as prescribed by Smallcakes; (5) obtain
8 written approval for all contemplated menu changes and all additions to and/or deletions of items
9 sold in the licensee's store; and 6) use only approved bakery suppliers. Within 15 days of the
10 Effective Date of this Consent Order, Martin shall send to all California licensees a letter informing
11 them that the Marketing Terms are immediately nullified and rescinded pursuant to an agreement
12 reached with the DBO. The letter will contain a signature line for the licensee to sign and date to
13 acknowledge receiving the letter. A copy of this Consent Order shall accompany the letter. Within
14 60 days of the Effective Date of this Consent Order, Martin shall send a copy of all signed
15 acknowledgements to Kenny V. Nguyen, Senior Counsel, by email at Kenny.Nguyen@dbo.ca.gov.

16 7. Binding. This Consent Order is binding on all heirs, assigns, and/or successors in
17 interest.

18 8. Future Actions by the Commissioner. The Parties acknowledge and agree that
19 nothing contained in this Consent Order shall limit the ability of the Commissioner to bring any
20 administrative or civil action to enforce compliance with this Consent Order or to seek penalties for
21 its violation. Further, the Commissioner reserves the right to bring any future action(s) against
22 Jeffery Todd Martin, Smallcakes Franchise Systems, LLC, Westwind Investments, Ltd., and or any
23 of the managers, officers, directors, shareholders or employees of Smallcakes Franchise Systems,
24 LLC or Westwind Investments, Ltd., for all unknown or future violations of the Franchise
25 Investment Law.

26 9. Independent Legal Advice. Jeffery Todd Martin, Smallcakes Franchise Systems,
27 LLC and Westwind Investments, Ltd. represent, warrant, and agree that they have had the
28 opportunity to seek independent advice from legal counsel and/or representative with respect to the

1 advisability of executing this Consent Order.

2 10. Reliance. Each of the Parties represents, warrants, and agrees that in executing this
3 Consent Order, they have placed no reliance on any statement, representation, or promise of any
4 other party, or any person or entity not expressly set forth herein, or upon the failure of any party or
5 any other person or entity to make any statement, representation, or disclosure of anything
6 whatsoever. The Parties have included this clause: (1) to preclude any claim that any party was in
7 any way fraudulently induced to execute this Consent Order; and (2) to preclude the introduction of
8 parol evidence to vary, interpret, supplement, or contradict the terms of this Consent Order.

9 11. Full Integration. This Consent Order is the final written expression and the complete
10 and exclusive statement of all stipulations, agreements, conditions, promises, representations, and
11 covenants between the Parties with respect to the matter hereof, and supersedes all prior or
12 contemporaneous agreements, discussions, negotiations, representations, and understandings
13 between and among the Parties, their respective representatives, and any other person or entity, with
14 respect to the subject matter covered in this Consent Order.

15 12. No Presumption from Drafting. In that the Parties have had the opportunity to draft,
16 review and edit the language of this Consent Order, no presumption for or against any party arising
17 out of drafting all or any part of this Consent Order will be applied in any action relating to,
18 connected to, or involving this Consent Order. Accordingly, the Parties waive the benefit of Civil
19 Code section 1654 and any successor or amended statute, providing that in cases of uncertainty,
20 language of a contract should be interpreted most strongly against the party who caused the
21 uncertainty to exist.

22 13. Waiver or Modification. The waiver of any provision of this Consent Order shall not
23 operate to waive any other provision set forth herein, and any waiver, amendment and/or change to
24 the terms of this Consent Order must be in writing and signed by the Parties. No amendment,
25 change, or modification of this Consent Order shall be valid or binding to any extent unless it is in
26 writing and signed by all the Parties affected by it.

27 14. Headings and Governing Law. The headings of the paragraphs of this Consent Order
28 are inserted for conveniences only and will not be deemed a part hereof or affect the construction or

1 interpretation of the provisions hereof. This Consent Order shall be construed and enforced in
2 accordance with and governed by California law.

3 15. Effective Date. This Consent Order shall become effective when signed by all Parties
4 and delivered by the Commissioner's counsel via email to Matthew J. Kreutzer, Respondents'
5 counsel, at: mkreutzer@HowardandHoward.com.

6 16. Counterparts. This Consent Order may be executed in any number of counterparts by
7 the Parties, and when each party has signed and delivered at least one such counterpart to the other
8 party, each counterpart shall be deemed an original, and taken together shall constitute one and the
9 same Consent Order.

10 17. Effect Upon Future Proceedings. If either Westwind Investments, Ltd. or Jeffery
11 Todd Martin applies for any license, permit or qualification under the Commissioner's current or
12 future jurisdiction, or if either Westwind Investments, Ltd. or Jeffery Todd Martin is the subject of
13 any future action by the Commissioner to enforce this Consent Order, then the subject matter hereof
14 shall be admitted for the purpose of such application(s) or enforcement proceeding(s).

15 18. Public Record. Respondents acknowledge that this Consent Order is a public record.

16 19. Information Willfully Withheld. This Consent Order may be revoked, and the
17 Commissioner may pursue all remedies available under the law against Respondents if the
18 Commissioner later finds out that Respondents knowingly or willfully withheld information used
19 and relied upon in this Consent Order.

20 20. Settlement Authority. Each signatory hereto covenants that he/she possesses all
21 necessary capacity and authority to sign and enter into this Consent Order.

22 21. Voluntary Agreement. Respondents enter into this Consent Order voluntarily and
23 without coercion and acknowledges that no promises, threats, or assurances have been made by the
24 Commissioner or any officer, or agent thereof, about this Consent Order.

25 22. Signatures. This Consent Order may be executed by facsimile or scanned signature,
26 and any such facsimile or scanned signature by any party hereto shall be deemed to be an original
27 signature and shall be binding on such party to the same extent as if such facsimile or scanned
28 signature was an original signature.

1 IN WITNESS WHEREOF, the Parties hereto have approved and executed this Order on the
2 dates set forth below opposite their respective signatures.

3
4 Dated: October 22, 2018

JAN LYNN OWEN
Commissioner of Business Oversight

5
6 By: _____
7 Mary Ann Smith
8 Deputy Commissioner
9 Enforcement Division

10 WESTWIND INVESTMENTS, LTD, AS
11 SUCCESSOR IN INTEREST TO SMALLCAKES
12 FRANCHISE SYSTEMS, LLC

13 Dated: October 22, 2018

14 By: _____
15 Jeffery Todd Martin
16 President of Westwind Investments, Ltd. as
17 successor in interest to Smallcakes Franchise
18 Systems, LLC

19 Dated: October 22, 2018

20 By: _____
21 Jeffery Todd Martin
22 In his personal capacity

23 APPROVED AS TO FORM:

24 By _____
25 Matthew J. Kreutzer, Esq.
26 Howard & Howard Attorneys PLLC
27 *Attorney for Jeffery Todd Martin and*
28 *Westwind Investments, Ltd. as successor*
in interest to Smallcakes Franchise Systems, LLC